

*Ex parte: In re GLASER, PETITIONER.*

ORIGINAL.

No. 16. Original. Submitted April 20, 1905.—Decided May 8, 1905.

Since the passage of the act of March 3, 1891, this court has no jurisdiction to review judgments or decrees of the District and Circuit Courts, directly by appeal or writ of error, in cases not falling within § 5 of that act. In cases over which this court possesses neither original nor appellate jurisdiction it cannot grant mandamus.

THE facts are stated in the opinion.

*Mr Richard A. Irving* and *Mr Lewis E. Carr, Jr.*, for petitioner, as to the jurisdictional question.

Mandamus lies to compel the Circuit Court to take jurisdiction. *Railroad Co. v Wiswell*, 22 Wall. 507, *Ex parte Schollenberger*, 96 U. S. 369; *Re Pennsylvania Co.*, 137 U. S. 451, *Matter of Hohorst*, 150 U. S. 653, *Re Grossmeyer*, 177 U. S. 48.

Petitioner cannot appeal from any decision of the Circuit Court of the Eastern District of New York for the reason that the court has refused to take jurisdiction.

If there is no action pending, there is no such thing as a proceeding to compel the filing of an answer to compel the placing of the case upon the calendar, and there is no such ground for the entry of such an order, and no appeal therefrom. It is a nullity unless an action is pending, except to show the attitude of the judge as to jurisdiction. Mandamus to the judges of the court to take jurisdiction is plaintiff's only remedy.

*Mr Alvin Cushing Cass* for respondent.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is a petition by Gertrude Glaser, as administratrix,

for mandamus, requiring the judges of the Circuit Court of the United States for the Eastern District of New York to take jurisdiction and proceed against Anthony P Langer in a certain suit alleged by petitioner to be pending and undetermined in that court, wherein Gertrude Glaser, as administratrix, is plaintiff, and Anthony P Langer is defendant, and to strike from the records of the court a certain order made on the fourteenth day of November, 1904, entitled. " 'In the Matter of the Application of Gertrude Glaser, Administratrix, &c., to compel the filing of an answer, or other relief, in an action alleged to be pending between Gertrude Glaser, as Administratrix, &c., of Isador Glaser, deceased, Plaintiff, and Anthony P Langer, Defendant,' whereby petitioner's application to compel the filing of said answer was denied, on the ground that no such action was pending, and to make such disposition of said suit as ought to have been made had said order not been made and entered therein "

The petition alleged the commencement in the Circuit Court of a common law action by petitioner as administratrix against Langer, to recover damages for negligence causing the death of petitioner's husband, and rested the jurisdiction on diversity of citizenship. The circumstances in respect of a mistake, by reason of which no summons was issued, though service of copy was made, are set forth in detail, and the fact alleged of notice of appearance and answer, and the assertion by defendant's attorney that this was in ignorance of the defect as to summons.

Leave to file the petition was granted, and this having been done, a rule was entered thereon, to which the judge presiding in the Circuit Court, and before whom all the proceedings referred to in the petition were had, and by whom the decision was made, made due return, submitting his action in the premises, and certifying that his reasons for denying the motion were set forth in the order, which is given at length. It appears therefrom that the motion was denied "upon the sole ground that no action of Gertrude Glaser, as administratrix of

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the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P Langer, defendant, is nor ever has been pending in this court."

In cases over which we possess neither original nor appellate jurisdiction; we cannot grant mandamus. Rev Stat. § 716, *In re Commonwealth of Massachusetts, Petitioner*, 197 U. S. 482.

Of course there is no pretense of original jurisdiction here, and since the passage of the act of March 3, 1891, 26 Stat. 826, c. 517, we have no jurisdiction to review the judgments or decrees of the District and Circuit Courts directly by appeal or writ of error in cases such as this case if pending in the Circuit Court.

*Rule discharged. Petition denied.*

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SCHLOSSER v. HEMPHILL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 175. Argued March 13, 14, 1905.—Decided May 8, 1905.

Where the judgment of the highest court of a State, in reversing a judgment against defendant, does not direct the court below to dismiss the petition but remands the cause for further proceedings, in harmony with the opinion, it is not a final judgment in such a sense as to sustain a writ of error from this court.

THE case is thus stated by the Supreme Court of Iowa, to which it had been carried by appeal from the District Court of Palo Alto county:

"This is an action in equity to quiet title to a tract of some two hundred and ninety acres of land in the south half of section 30, township 97, range 34, in Palo Alto county. Plaintiff is the admitted owner of lots two and three, forming a part of said tract, and containing about 99 acres. According to the